

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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| In the matter of the amendment) | NOTICE OF PUBLIC HEARING |
| of ARM 17.24.201, 17.24.202,) | ON PROPOSED AMENDMENT, |
| 17.24.203, 17.24.206,) | ADOPTION AND REPEAL |
| 17.24.207, 17.24.212,) | |
| 17.24.213, 17.24.214, the) | |
| adoption of new rules I) | (OPENCUT MINING) |
| through X, and the repeal of) | |
| 17.24.204, 17.24.205 and) | |
| 17.24.215 pertaining to) | |
| opencut mining) | |

TO: All Concerned Persons

1. On November 5, 2003, at 9:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111, Department of Environmental Quality, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption and repeal of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., October 27, 2003, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.24.201 APPLICABILITY (1) This subchapter applies to opencut ~~mining~~ operations as provided in the Opencut Mining Act (Title 82, chapter 4, part 4, MCA, hereinafter referred to as "the Act").

~~(2) Underground phosphate mine operators shall obtain a reclamation contract to ensure reclamation of the aboveground associated disturbance.~~

~~(3)~~ (2) Those An operators conducting a sand, gravel, bentonite, clay, or scoria ~~or phosphate rock~~ mining operations pursuant to the provisions of a reclamation contract issued under the Montana Opencut or Strip Mined Land Reclamation Act of 1971 ~~are~~ is recognized as being in compliance with Montana law. However, should ~~the~~ that operator begin a new opencut operations as defined in 82-4-431, MCA, or ~~desire to~~ expand an opencut operations beyond the existing contract area, ~~he~~ the operator shall be responsible for first obtaining a ~~new contract permit~~ under the provisions of the Act as amended.

(3) Contracts and permits in effect on [the effective date of these amendments] need not be amended to comply with rules and rule amendments adopted on [the effective date of these

amendments]. Applications for permits, permit amendments, and permit transfers that were submitted prior to [the effective date of these amendments] remain subject to provisions of this subchapter relating to application requirements as they read on the date the application was submitted.

~~(4) Under certain conditions specified in 82-4-431, MCA, an operator who holds a contract may remove up to 1,000 cubic yards of mineral and overburden without first obtaining an additional contract or amendment. In addition to the requirements stated in 82-4-431, MCA:~~

~~(a) the operator shall revegetate the affected land with a seed mixture containing, at a minimum, 3 different grass species, each of which shall be adapted to the climate, soil, and postmining land use of the affected area; or by using other methods and types of establishment approved by the department; and~~

~~(b) the operator shall control noxious weeds as specified in the respective district weed management plan.~~

AUTH: 82-4-422, MCA

IMP: 82-4-431, MCA

REASON: The proposed amendment to (1) is necessary because, according to the definition in the Act, "opencut mining" only includes the removal of overburden and mine materials. The rules address opencut mining, processing, and reclamation. Use of the term "opencut operation" encompasses those actions, and is necessary for consistency and to accurately describe the scope of the program and the rules. The term "opencut operation" is defined in the proposed amendments to ARM 17.24.202.

The proposed deletion of (2) is necessary because legislation in 1999 transferred regulation of phosphate mining to the Metal Mine Reclamation Act.

The proposed amendment to existing (3) is necessary because no phosphate rock mining operations remain permitted under the 1971 law; therefore, the reference to phosphate is no longer needed. Legislation in 1999 changed the term "contract" to "permit"; therefore, the rules throughout have also been amended to reflect the change from "contract" to "permit" for consistency with the 1999 legislation. Section (3) refers to the 1971 law; therefore, the term "contract" is retained until the last reference. The second sentence in (3) was amended because, as currently written, it incorrectly implies that it is legal for a permitted operator to obtain another permit after beginning a new operation.

New (3) is proposed to provide for orderly implementation of these rules. The Board has determined that it would be unfair to require resubmission of applications submitted, but not approved, prior to the effective date of these rules.

The proposed deletion of (4) is necessary because the rule repeats what is stated in the Act, and reclamation requirements are adequately addressed in other portions of the Act and rules.

17.24.202 DEFINITIONS When used in this subchapter, unless a different meaning clearly appears from the context, the following definitions apply:

~~(1) (2)~~ "Department" means the department of environmental quality provided for in Title 2, chapter 15, part 35, MCA.

~~(2) "Contiguous" and "nearby" mean within 1,000 feet.~~

(1) "Access road" means an existing or proposed non-public road used in connection with opencut operations. The term includes the roadbed, cut and fill slopes, ditches, and other structures and disturbances related to access road establishment, use, and reclamation.

(3) "Facility-level area" means access roads and areas where parking, equipment and material storage, soil and overburden stockpiling, fuel storage, mine material processing and stockpiling, other product production and storage, and water system and control structures are situated.

(4) "Main permit area" means facility-level areas and mine-level areas, except access roads.

(5) "Mine-level area" means areas where excavating, grading, and excess overburden and fines disposal occur.

(6) "Mine material" means sand, gravel, scoria, bentonite, clay, soil, and peat.

(7) "Opencut operation" means the areas and activities related to opencut mine site preparation, access road use, mine material mining and processing, and reclamation.

(8) "Overburden" means the material below the soil and above the mine material.

(9) "Soil" means the dark or root-bearing surface material, which is typically the O, A, E, and B horizons in soil profile descriptions.

AUTH: 82-4-422, MCA

IMP: 82-4-403, 82-4-422, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The proposed amendment to the introductory sentence of ARM 17.24.202 is necessary for general housekeeping purposes.

The proposed deletion of (2) is necessary because the terms "contiguous" and "nearby" are not used in the rules. Because the rules define distances as needed, these terms can be deleted.

The proposed addition of new (2) through (5) is necessary because the terms "access road," "facility-level area," "main permit area," and "mine-level area," have become part of program and operator lexicon and are used throughout the rules and program materials. It is necessary to define these terms so that they are clearly understood by all parties that are governed by or deal with these rules, to establish standard program terminology, to clarify the rules, and to present the rules according to current and appropriate terminology.

The proposed addition of new (6) is necessary because legislation in 1999 changed the term for mined substances

covered under the Act from "minerals" to "materials." This change resulted in several points of confusion since the Act and rules discuss "overburden," "waste," "soil," "carbonaceous," "road surfacing," "contaminated," "surface," and "other" materials. For clarity, "material" in the context of mined substances has been modified with "mine," thus the term "mine material." This definition is necessary for consistency with the Act, to establish standard program terminology, to clarify the rules, and to present the rules according to current and appropriate terminology. "Mineral" has been changed to "mine material" throughout the rules.

The proposed addition of new (7) is necessary because the Act defines "opencut mining" as the removal of overburden and mine material. However, the Act and rules address a broader range of activities related to an opencut mine site; therefore, a broader term is needed when referring to, and discussing the sum of, opencut site activities. This definition is necessary to establish standard program terminology, to clarify the rules, and to present the rules according to current and appropriate terminology.

The proposed addition of new (8) is necessary because mining and reclamation involve distinctly different materials - primarily soil, overburden, and mine material. It is imperative that all parties that are governed by or deal with these rules have a common understanding of what these terms mean. The definition of "overburden" in 82-4-403(9), MCA, is more inclusive than the understanding of that term by operators and Department staff, who usually distinguish between soil or soil materials and overburden. The definition in the rule is more specific than that in the Act in order to succinctly describe the location of material commonly called "overburden" by operators and regulators. The definition of "overburden" in the rule is accepted by operators and regulators, and is necessary to establish standard program terminology and to clarify the rules.

The proposed addition of new (9) is necessary because this definition succinctly pinpoints the location of the material commonly called "soil." This description is accepted in the regulatory and private sectors, and is necessary to establish standard program terminology, to clarify the rules, and to present the rules according to current and appropriate terminology.

17.24.203 BOND OR OTHER SECURITY (1) An application for a ~~contract permit~~ must be accompanied by a bond or other ~~form of~~ security acceptable to the department under 82-4-433, MCA, of at least \$200-~~00~~ for each acre of affected land as defined in 82-4-403, MCA. After the department has evaluated the site it may require an increase in the amount of bond or other security in accordance with 82-4-433, MCA.

(2) The department may adjust the bonding or other security levels yearly. Should the department determine that additional bond or other ~~securities are~~ security is required, the operator ~~must~~ shall submit ~~such additional security~~ it

within 30 days of notification by the department.

(3) If the bond, ~~letter of credit~~, or other form of security is canceled or otherwise becomes ineffective, the operator ~~must~~ shall reinstate ~~such bond or it or~~ replace ~~such bond or security it~~ with other another bond, ~~letter of credit~~, or other ~~form of~~ security acceptable to the department under 82-4-433, MCA, within 30 days ~~after of~~ notification by the department of the cancellation. Upon failure of the operator to reinstate or replace such bond or other security within that time, the department may suspend the ~~reclamation contract(s)~~ permit(s) secured by such bond or other security until ~~its~~ its reinstatement or replacement ~~of the bond or other security has been made~~. The operator shall immediately cease all opencut ~~mining~~ operations, except reclamation activities, on lands covered by a ~~reclamation contract which has been~~ suspended permit.

(4) ~~Any requests~~ Requests for full or partial release of bond or other ~~reclamation~~ security must be submitted on forms provided by the department ~~and may be submitted along with the annual progress report~~.

AUTH: 82-4-422, MCA

IMP: 82-4-432, 82-4-433, MCA

REASON: The proposed amendments to (1) and (2) are necessary to establish standard program terminology and to clarify the rules. The terminology "bond or other security" is necessary to eliminate confusion. It is the terminology used in the bonding statute.

The proposed amendment to (3) is necessary because "letter of credit" is already addressed in the Act along with other forms of security; therefore, it does not need to be specially listed here.

The proposed amendment to (4) is necessary because an operator may submit a release request at any time, so it is not necessary to mention the annual progress report.

17.24.206 LANDOWNER'S CONSENT TO FOR RECLAMATION (1) ~~In order to ensure that the affected land will be reclaimed as provided in the mining and reclamation plan, the An operator shall secure the agreement in writing consent of the owner of the land to be affected by mining opencut operations to allow the operator, or the department, or agents or contractors of the department, to enter and reclaim the affected land as provided in the plan of operation. The landowner consent must be submitted on a form provided by the department. No application for a contract shall permit, or an amendment to add acreage or change the postmining land use, may be approved unless accompanied by such an agreement in a form approved by the department and executed by the landowner a landowner consent form.~~

AUTH: 82-4-422, MCA

IMP: 82-4-422, 82-4-423, 82-4-432, 82-4-434, MCA

REASON: The proposed amendment to (1) is necessary because the introductory phrase is covered in the ensuing text. Use of the word "consent," rather than "agreement in writing," is consistent with the use of the term throughout the rules. The proposed amendment is also necessary to reflect the change from "mining" to the broader term "opencut operation." The addition of a consent requirement for amendments that will add acreage or change the postmining land use is necessary to ensure that the landowner's consent remains in effect. The amendment also clarifies that the operator must use the proper form from the Department to obtain the consent of the landowner.

17.24.207 ADDITIONAL REQUIREMENTS FOR BENTONITE MINES

(1) In addition to the requirements imposed by ARM 17.24.203, ~~through 17.24.206, and [New Rules I through VII],~~ the department may require the following information as part of the plan of operation for a bentonite mining operation: ~~an operator mining bentonite to submit information described in this rule as part of the mining and reclamation plan.~~

~~(2) (a) The department may require an analysis of the surface materials~~ soil and each major stratum in the overburden, including determinations of saturation percentage, pH, electrical conductivity, sodium ~~absorption~~ adsorption ratio, texture, and additional ~~analyses as required by~~ characteristics the department may require.

(i) In submitting this information, the operator shall also list:

- (A) the number of samples taken_{7i};
- (B) the methods by which they were taken_{7i};
- (C) the location and depths from which they were taken_{7i};
- (D) the names and addresses of the persons who took the samples ~~if other than the operator,~~_i
- (E) the methods of analysis_{7i}; and
- (F) the names and addresses of ~~those~~ the persons who analyzed the samples.

(ii) The soils ~~analyses~~ analysis must be accompanied by a map delineating:

- (A) the soil types_{7i};
- (B) sample site locations_{7i};
- (C) ~~depths~~ thicknesses of soils ~~materials~~ and overburden to be ~~salvaged~~ stripped for each soil type_{7i} and
- (D) the dominant vegetative species present on each soil type_{7i} and

~~(3) The department may require a listing of the fish and wildlife species on and contiguous to the proposed mine site, relative abundance of each, and season(s) of use.~~

~~(4) (b) The department may require a description of the final disposal of bentonite cleanings, stray bentonite seams, and overburden that are unsuitable for plant growth, encountered in stripping overburden, and materials toxic to plants or animals. At a minimum, s~~Such materials must first be covered with buried under at least 3 three feet of non-toxic overburden, if available, and then with salvaged materials where

available material suitable for sustaining the postmining vegetation.

~~(5) The department may require a description of how grading on all bentonite pits and spoil piles will be conducted. At a minimum, the grading of all bentonite pits must include backfilling the pit to the degree that, when possible, the natural drainage pattern will be maintained and all potential boggy conditions will be eliminated unless the surface landowner indicates to the department, in writing, that development of a water body is desirable and the department approves the design of such water body. If the landowner deems such a water body to be desirable, the operator shall then submit to the department a diagram showing the design of the water body. The department shall disapprove any design for a water body which creates unsafe conditions for livestock or wildlife, adversely affects other landowner's rights, or does not reasonably assure a permanent, viable water body.~~

~~(6) The department may require a description of how mining and reclamation on a hillside will be carried out. At a minimum, all overburden removed must be deposited in such a manner that it can be placed back in the cut and final grading will return the disturbed area to as near the original topography as possible.~~

~~(7) The department may require a description of annual grasses or grains that, at the department's direction, may be used to stabilize certain disturbed areas prior to the establishment of the required cover of perennial vegetation.~~

~~(8) If the location of future bentonite excavations cannot be determined more than a year in advance, the department may require the information described in this rule to be submitted to the department yearly, 30 days prior to the anniversary date of the contract.~~

AUTH: 82-4-422, MCA

IMP: 82-4-432, 82-4-434, MCA

REASON: The proposed amendments of (1) and (2) are necessary for clarification and consistency with the rules and the Act.

The proposed deletion of (3) is necessary because this information is set forth in proposed New Rule VII.

The proposed amendment to (4) is necessary to make the burial depth requirement consistent with the burial requirement under proposed New Rule III. The availability language has been eliminated because non-toxic overburden of salvaged materials requirements are necessary to ensure that reclamation occurs.

The proposed deletion of (5) is necessary since this information is set forth in proposed New Rules III and IV.

The proposed deletion of (6) is necessary because the requirements for backfilling and grading are addressed in proposed New Rules III and IV.

The proposed deletion of (7) is necessary because cover crop use is set forth in proposed New Rule IV.

The proposed deletion of (8) is necessary because current

operators identify future bentonite excavation areas more than a year in advance. Operators also submit complete permit applications that cover several years of operation. An operator can change its plan of operation through the amendment process; therefore, this section is not needed.

17.24.212 APPROVAL OR DISAPPROVAL OF AN APPLICATION FOR A CONTRACT PERMIT (1) Upon receipt of ~~an~~ a permit application ~~for a mined land reclamation contract~~ and within the time limits provided in ~~82-4-434~~ 82-4-432(4), MCA, the department shall ~~conduct a detailed examination of~~ inspect the proposed site and evaluate the operator's application to determine if the requirements of the Act, and this subchapter, will be satisfied. If the department is unable to evaluate a permit application because weather or other field conditions prevent an adequate site inspection, then the application must be disapproved.

(2) The department shall approve ~~the~~ a permit application and ~~enter into a contract with the operator~~ if it determines that:

(a) the application contains the following:

(i) \$50 application fee, if required;

(ii) a completed copy of the permit application form provided by the department;

(iii) plan of operation submitted on a form provided by the department;

(iv) bond or other security, if required;

(v) landowner consent form; and

(vi) zoning compliance form; and

(b) the application materials satisfy fee, bond or security, and the detailed mining and reclamation will satisfy the requirements of the Act and this subchapter. If, however, the department determines that the mining or reclamation of an area for which an application has been submitted cannot be carried out in accordance with the provisions of the Act and this subchapter, or if the department is not able to make such a determination because weather or other conditions on site do not permit an appropriate on-site evaluation, then the application shall be disapproved.

(2) ~~The department may not approve any application involving excavations on any river or live stream channels or on floodways at locations likely to cause detrimental erosion or offer a new channel to the river or stream at times of flooding except that such excavations may be allowed when necessary to protect or promote the health, safety, or welfare of the people.~~

(3) Before approving an operator's permit application, ~~for a contract~~ the department shall submit a copy of the mining and reclamation plan of operation, including map(s), to the ~~director of the university of Montana statewide archeological survey~~ state historic preservation office for evaluation of possible cultural resources ~~archaeological or historical~~ in the proposed permit area ~~to be mined, as required by 82-4-434, MCA.~~ If the site is likely to contain significant cultural resources, ~~archaeological or historical artifacts, then,~~ the department may require that the operator sponsor ~~an~~ a cultural resources

archaeological survey by a competent professional authorities authority prior to approving the application.

~~(4) If the site is likely to contain critical fish and wildlife use areas, the department may require a fish and wildlife survey covering all seasons of wildlife use. This survey report, when submitted, shall include a complete presentation of all field data, identification of the data source and a detailed description of the methodology used to gather the data.~~

~~(5) (4) All mined land reclamation contracts A permit must provide that the operator shall comply with all the requirements of the Opencut Mining Act and rules adopted thereunder this subchapter.~~

(5) A permit does not become operative until issued by the department, and an applicant may not begin opencut operations until a permit is issued.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The proposed amendment to (1) is necessary because site inspections are an essential part of the application review process. They are important because they give Department (Opencut Mine Program) staff an understanding of the site layout and features and surrounding lands and features. They provide information to particular factors or resources of concern, such as the proximity and location of residences, streams, and wildlife, in order to assure that the requirements of the Act and rules are complied with. Also, Department staff is trained as para-archeologists and conduct on-site reconnaissance for cultural resources on all sites undisturbed by modern human activity, as part of the Department's responsibility under the Act to protect such resources from mining operations. The language requiring denial if an adequate site inspection cannot be made is being relocated for purposes of organization. The last sentence is modified language from current ARM 17.24.212(1).

Proposed (2) is necessary to clarify what a permit application must contain and under what circumstances it must be approved. The current rule does not reference all the components of an application that must be provided under the Act and rules. In order to ensure compliance with these requirements, an application should not be approved if it does not contain all these components. The amendments so provide. The proposed language "if required" is necessary because fees and bonds are not required for government entities, and fees are not required for soil and peat mining.

The proposed deletion of existing (2) is necessary because such requirements are adequately incorporated in proposed New Rule III.

The proposed amendment to (3) to replace "mining and reclamation plan" with "plan of operation" is proposed for consistency of terminology with New Rule III, and because "plan

of operation" is a more comprehensive term that covers all disturbance aspects of an opencut operation, not only mining and reclamation. Cultural resources must be protected from all disturbance, not just mining and reclamation, and thus the "plan of operation" needs to be submitted to the agency that currently reviews opencut plans in regard to cultural resources. "Cultural resources" is a more commonly used term that means the same as "archeological and historical values." The amendment of "area to be mined" to "proposed permit area" is necessary since opencut operations disturb this broader area.

The proposed deletion of existing (4) is for the purpose of moving the option of requiring fish and wildlife information from ARM 17.24.212(4) and 17.24.207(3) for bentonite mines and consolidating it under proposed New Rule VII. This will streamline this requirement.

The proposed amendment to (5) is necessary to ensure that operators know that the prohibition contained in the Act against operating without a permit remains in effect until the permit is issued.

17.24.213 AMENDMENT AND REVISION OF CONTRACTS PERMITS

~~(1) An operator conducting a mining operation under the provisions of a contract issued pursuant to the Act may seek apply for an amendment to either the bond and security portions of the contract, or the mining and reclamation plan, its permit by filing submitting a an amendment application to request for an amendment with the department. Upon receipt of an amendment application, the department shall, if it determines that site inspection is necessary to adequately evaluate the application, inspect the proposed site and evaluate the application to determine if the requirements of the Act and this subchapter will be satisfied. If the department determines that a site inspection is necessary and it is unable to evaluate an application because weather or other field conditions prevent an adequate site inspection, the department shall disapprove the application.~~

~~(2) The bond and security portion of an existing contract may be amended only pursuant to the provisions of 82-4-432, 82-4-433, or ARM 17.24.203.~~

~~(3) The reclamation plan in an existing contract can only be amended pursuant to the provisions of 82-4-434, MCA. A request for an extension of time to complete a mining and reclamation plan shall be considered a request for an amendment to an existing contract.~~

(2) The department shall approve an amendment application if it determines that:

(a) the application contains a completed copy of the amendment application form provided by the department, additional bond if necessary, a new landowner consent form if required under ARM 17.24.206(1), a new zoning compliance form if required under [New Rule VIII], and the proposed plan of operation revisions; and

(b) the application and plan of operation revisions satisfy the requirements of the Act and this subchapter.

~~(4) (3) Regardless of the portion of a contract for which an amendment is sought, no~~ An amendment does not becomes operative until approved by the department. Once approved, ~~by the department, however,~~ an amendment becomes a part of the original contract permit.

~~(5) (4) An amendment approved by the department pursuant to this rule~~ application does not require the payment of an additional fee.

AUTH: 82-4-422, MCA

IMP: 82-4-432, 82-4-433, 82-4-434, 82-4-436, MCA

REASON: The proposed amendment to the catchphrase in ARM 17.24.213 is necessary because the term "revision" is redundant.

The proposed amendment to (1) is necessary to delete the reference to bond, security, and plan since it does not correctly address the broader scope of what a permit amendment involves. Reference is made to the portion of the Act that addresses amendments. Site inspections may be an essential part of the amendment application review process, providing Department staff an understanding of the site layout and features and surrounding lands and features. They provide information to particular factors or resources of concern, such as the proximity and location of residences, streams, and wildlife, in order to ensure that the requirements of the Act and rules are complied with. Also, Department staff is trained as para-archeologists and conduct on-site reconnaissance for cultural resources on all sites undisturbed by modern human activity, as part of the Department's responsibility under the Act to protect such resources.

The proposed deletion of existing (2) and (3) is necessary because these requirements are consolidated in (1).

Proposed new (2) is necessary to clarify what a permit amendment application must contain and when it must be approved. The current rule does not reference all the components of an application that must be provided under the Act and rules. In order to ensure compliance with these requirements, an application should not be approved if it does not contain all these components. The amendments so provide.

The proposed amendment to existing (4) is necessary for conciseness and clarity.

The proposed amendment to existing (5) is necessary to remove excess verbiage.

17.24.214 ANNUAL PROGRESS REPORT (1) ~~Every~~ An operator holding who possesses one or more a reclamation contract permits pursuant to the Act must shall submit one annual progress report for the previous calendar year to the department ~~between January 15 and on or before March 15~~ 1 of each year.

(2) The annual progress report must be ~~made~~ submitted on ~~the a~~ form provided by the department. ~~and~~ In addition to the requirements in 82-4-403, MCA, the report must list all of the operator's permitted sites and provide the information required by the department for each ~~mine of those sites operated or~~

~~reclaimed during the calendar year.~~

~~(3) Updated maps must be submitted when the most current map on file with the department for a site no longer accurately represents on the ground conditions at the site. Updated maps must show:~~

~~(a) the features required by ARM 17.24.204;~~

~~(b) the areas mined to date;~~

~~(c) the areas reclaimed to date; and~~

~~(d) any other features deemed necessary by the department.~~

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-434, MCA

REASON: The proposed amendment to ARM 17.24.214(1) is necessary to clarify that only one progress report is to be submitted, to clarify the report period, and to provide operators more latitude regarding the time for submission of the report.

The proposed amendments to (2) and (3) are necessary for clarification, to include a reference to the Act's definition of "progress report" which was expanded by legislation in 1999, and to delete map requirements that are no longer needed. Requiring that an operator list all permitted sites on its report is more administratively convenient for the Department in its annual evaluation of all permitted sites. The Department supplies a list of permitted sites with each annual progress report reminder to the operator and requests minimal information on the report; therefore, it is not difficult for an operator to list and report the status of its sites.

4. The proposed new rules provide as follows:

NEW RULE I GENERAL APPLICATION CONTENT AND PROCEDURES

(1) An application must contain the information required by 82-4-432, MCA, and [New Rules II through IV and VI through VIII]. Review of the application is conducted in accordance with 82-4-432, MCA, and (2).

(2) If, in its review, the department identifies additional information pursuant to [New Rules III(3), VI(7), and VII(1)] that must be submitted, the application is deficient until that information is submitted. The department shall notify the applicant of the additional information required through a deficiency notification, pursuant to 82-4-432(4), MCA.

(3) Application materials printed in color or larger than 11 x 17 inches must be submitted in duplicate, as required by the department.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-431, 82-4-432, MCA

REASON: The purpose of proposed (1) is to provide a convenient reference to the Act for the general materials required to be submitted in an application.

Section (2) is proposed because the purpose of additional

application materials is to provide information necessary to ensure that the requirements of the Act and rules are met. Review of the application cannot be performed until the materials are provided.

Proposed (3) is an important administrative requirement because the Department has no easy method to copy the materials referenced if copies of the application are needed for both the Helena office and a field office.

NEW RULE II PLAN OF OPERATION--PREMINE INFORMATION

(1) The plan of operation must include the following premine information:

(a) uses of natural and man-made surface water features in and within 500 feet of access roads and 1,000 feet of the main permit area. Surface water features include, but are not limited to, ephemeral, intermittent, and perennial streams, wetlands, ponds, springs, ditches, and impoundments;

(b) depths, water levels, and uses of water wells in and within 1,000 feet of the main permit area, and the information sources used, such as landowners, field observations, and water well logs. Available well logs must be submitted with the plan of operation;

(c) estimated ordinary high, ordinary, and ordinary low water table levels in the main permit area, and the information sources used, such as landowners, field observations, and water well logs;

(d) average soil and overburden thicknesses in the main permit area. At least three separate test hole locations must be used to measure these thicknesses. Places where the soil and overburden profile is exposed, such as roadcuts, may be used as test hole locations. Natural resources conservation service or other soil survey information may be used to supplement, but not replace, test hole information; and

(e) structures and residential areas that could be impacted by opencut operations. Examples of such areas and structures include, but are not limited to, inhabitable dwellings and commercial and industrial facilities.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-431, 82-4-432, 82-4-434,
MCA

REASON: The purpose of proposed New Rule II is to change and rearrange the information requirements of current ARM 17.24.204(3) so that there is less emphasis on narrative information and more emphasis on map information. It is easier and more convenient for applicants to provide, and the Department to use, map information. Information about site location, topography, present land uses, past mining disturbances, vegetation, and wildlife habitat locations is required in proposed New Rule VI. Map and narrative information is required for surface water features, water wells, soil and overburden test holes, and residential areas and structures.

The requirements are revised to reflect current standards, practices, and needs.

The purpose of proposed (1)(a) and (b) is to split current ARM 17.24.204(3)(d) into the separate topics of surface water and water wells. This is needed to emphasize their individual importance in the evaluation of a site for mining, reclamation, and related hydrologic impacts. Separate listing also allows for clear statements to be made regarding the information requirements for each topic. The first half of the water well text is necessary so that adequate water table level and water source information is available for making appropriate mining, reclamation, and impact decisions regarding ground water resources. The requirement to provide information sources is needed so that the operator validates the information provided.

The purpose of proposed (1)(c) is to require water table information necessary for site evaluation, and to set forth a requirement to provide information sources so that the operator validates the information provided.

The purpose of proposed (1)(d) is to define the soil and overburden information that is needed to properly evaluate these resources regarding salvage, storage, and replacement. The requirement to provide information sources is needed so that the operator validates the information provided.

The purpose of proposed (1)(e) is to require the types of additional information that are necessary to reflect the 1999 legislative amendments (82-4-434(2)(o) and (p), MCA) regarding the mitigation of impacts to residential areas and to adjacent lands and structures.

NEW RULE III PLAN OF OPERATION--SITE PREPARATION, MINING, AND PROCESSING PLANS--AND PERFORMANCE STANDARDS (1) The plan of operation must include the following site preparation, mining, and processing plan commitments and information:

(a) an access road and main permit area boundary markers section, including a statement that the operator has clearly marked on the ground the access road segments to be improved or constructed and the main permit area boundary segments that require marking, and will maintain the markings as required by this rule. Road segments to be improved or constructed must be marked at every corner and along each segment so that the markers are visible from one to the next and no more than 300 feet apart. Those portions of the boundary defined by definite topographic changes, natural barriers, or man-made structures, or located in active hayland or cropland, need not be marked. Other boundary segments must be marked at every corner and along each segment so that the markers are visible from one to the next and no more than 300 feet apart. Acceptable road and boundary markers include brightly colored, brightly painted, or brightly marked fenceposts, rocks, trees, and other durable objects. A boundary marker must remain functional until the beginning of final reclamation of the area next to that marker;

(b) an access road establishment, use, and reclamation section, including:

(i) a statement that the operator will appropriately

establish, use, and reclaim access roads, and downsize to the premine condition or totally reclaim these roads by retrieving and properly handling surfacing materials; backfilling and grading road locations in a manner that leaves stable surfaces blended into the surrounding topography and drainageways; and ripping, resoiling, reconditioning, and seeding or planting the locations with the approved vegetative species, unless the landowner requests in writing that specific roads or portions thereof remain open and the department approves the request; and

(ii) a description of the access roads or portions thereof to be improved or constructed, including their locations, lengths, widths, drainageway crossings, and surfacing; and of the roads or portions thereof proposed to remain open, per landowner request, at the conclusion of opencut operations, including their locations, intended uses, and final widths. Some or all of this information may be presented on the site or area map. Improvements include, but are not limited to, blading, widening, and surfacing. A road or portion thereof may remain open for a reasonable postmining use and must be left in a condition suitable for that use;

(c) a mining, processing, and hauling section, including a description of the methods and equipment to be used to mine and process mine material, and to haul it and the products made from it. The department may require a description of the anticipated general mining progression, including where the first stripping and excavation will occur, the direction mining will progress, and other relevant information. The anticipated location and timing for the installation of facilities such as a screen, crusher, asphalt plant, wash plant, batch plant, pug mill, and other facilities may also be required;

(d) an hours of operation section, including a description of the proposed hours of operation. The department may reasonably limit hours to reduce adverse impacts on residential areas. A complete and accurate log that lists general on-site activities and the dates and times they occurred must be maintained for an opencut operation subject to restricted hours. Log information must be presented to the department upon request;

(e) a water protection and management section, including:

(i) a statement that the operator will take appropriate measures to protect on- and off-site surface water and ground water from deterioration of water quality and quantity that could be caused by opencut operations; take appropriate measures to prevent, minimize, or mitigate adverse impacts to on- and off-site surface water and ground water systems and structures that could be caused by opencut operations; keep non-mobile equipment above the ordinary high water level of surface water and ground water; appropriately establish, use, and reclaim opencut-operation-related hydrologic systems and structures; install or construct fuel storage containment structures in accordance with the current codes adopted by the state fire marshal for each single-wall, non-mobile, fuel storage tank placed and used in and within 500 feet of access roads and 1,000 feet of the main permit area; routinely inspect and maintain

these tanks to prevent leaks and spills; retrieve and discard spilled fuel and contaminated materials in a lawful manner; and report to the department a fuel spill that reaches state waters, as defined in 75-5-103, MCA, or that is greater than 25 gallons. The department may require on- and off-site surface water and ground water quality and quantity monitoring before, during, and after opencut operations. When opencut operations will cause the diversion, capture, or use of water, the operator shall consult with the regional office of the department of natural resources and conservation, water resources division, concerning water rights and submit a summary of that consultation with the plan of operation; and

- (ii) a description of the source, quantity, storage, use, and discharge of water to be used for opencut operations; special measures to be used to protect on- and off-site surface water and ground water from deterioration of water quality and quantity; special measures to be used to prevent, minimize, or mitigate on- and off-site impacts on surface water and ground water systems and structures; water management and erosion control plans for surface disturbances that will intercept a drainageway, significant runoff, or ground water; measures to be used to protect the water rights of other parties or to replace an adversely affected water source that had a beneficial use; and fuel storage containment structures to be installed or constructed;

- (f) a mine material handling section, including:

- (i) a statement that the operator will keep mine material stockpiles out of drainage bottoms and off of slopes greater than 3:1, and a statement that, at the conclusion of opencut operations, the operator will, except as provided in (ii) below, remove from the permit area or bury all excavated or processed mine material, unless the landowner requests on the landowner consent form that specific types, grades, and quantities of mine material remain stockpiled; consolidate mine materials to remain stockpiled into piles of similar type and grade; and leave the quantity of soil that was stripped from the unreclaimed area under and around a mine material stockpile in a shaped and seeded pile within 100 feet of that stockpile. The operator remains liable for the unreclaimed area under and around a mine material stockpile until the mine material is removed and the site reclaimed, or ownership of the stockpile or possession of the permit is transferred to the landowner or another party; and

- (ii) a description of the types, grades, and estimated quantities of mine material proposed to remain stockpiled per landowner request at the conclusion of opencut operations, and justifications for the quantities based on current and expected demand for the materials. The department shall reject a landowner's request that certain mine materials remain stockpiled if adequate justification is not provided;

- (g) a mined-area backfill section, including:

- (i) a statement that the operator will use only clean fill from any source and on-site-generated asphaltic pavement as mined-area backfill; dispose of other wastes in compliance with applicable state laws and rules; bury on-site-generated

asphaltic pavement, coarse clean fill, and other clean fill unsuitable for plant growth under at least three feet of material suitable for sustaining the postmining vegetation; and, at the conclusion of opencut operations, remove stockpiled asphaltic pavement, concrete with protruding metal, and clean fill from the permit area. Clean fill consists of dirt, sand, fines, gravel, oversize rock, and concrete with no protruding metal. On-site generated asphaltic pavement must be disposed of at least 25 feet above the ordinary high water table. The operator may propose that excess on-site-generated overburden and fines be disposed of at a site outside of the mined area but within the permit area. Fines consist of natural or crushed rock that is 1/4 inch or smaller; and

(ii) a description of the material types, estimated quantities, and fill designs for mined-area backfill, and of the plan for stockpiling and recycling imported asphaltic pavement and concrete;

(h) an additional impacts section, including a description of the methods and materials to be used to minimize impacts, as necessary, on the residential areas and structures identified under [New Rule II(1)(e)]; repair or replace man-made structures affected by opencut operations within the permit area; and address other opencut operation impacts not addressed in other sections of the plan of operation; and

(i) an additional commitments section, including a statement that the operator will inform key personnel and subcontractors involved in opencut operations of the requirements of the plan of operation; take proper precautions to prevent wildfires; provide appropriate protection for cultural resources that could be affected by opencut operations and promptly notify the state historic preservation office should such resources be found; and submit an annual progress report to the department.

(2) Upon issuance of the permit, the operator shall comply with all commitments required by this rule and with the requirements for the conduct of operations contained in this rule.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The purpose of proposed (1)(a) is to replace current ARM 17.24.205(16). This section is needed to clearly outline functional road and boundary marking requirements. The requirements of ARM 17.24.205(16) are retained and expanded, except that the requirement to mark the "centerlines" of roads is deleted since markers so located tend to be run over and destroyed. By having to mark access roads and the main permit area, the applicant must pay close attention to access road location and main permit area location and size. Markers help ensure that access roads are located as described in the plan, help ensure that the operation is kept within the permitted area, and help the department in the performance of site

evaluations.

The purpose of proposed (1)(b) is to replace current ARM 17.24.205(5), (6), and (10), and combine the road improvement, construction, and reclamation text from these sections into one rule. The proposed text is needed to clearly outline necessary road requirements. The requirements of current ARM 17.24.205(5), (6), and (10) are retained and expanded to require more information and thereby allow the Department to evaluate the proposed roads, except that, instead of the operator proposing that a road be left open, the request must originate with the landowner via a written request. This method will help ensure that only needed roads remain open.

The purpose of proposed (1)(c) is to require basic opencut operations information so that the Department can properly evaluate potential environmental impacts and address possible public concerns.

The purpose of proposed (1)(d) is to implement the requirement of restricted hours of operation since the distance between opencut mine sites and populated areas is decreasing over time, and the public is becoming more concerned about opencut operations.

The purpose of proposed (1)(e) is to replace current ARM 17.24.205(7) and (8) and combine the water management and protection text into one rule. The proposed text is needed to clearly outline necessary water protection and management requirements. The requirements of current ARM 17.24.205(7) and (8) are retained. Text has been added concerning non-mobile equipment location so that such equipment is not placed where it could be submerged in water and release pollutants. Text has also been added to require fuel storage containment structures for single-wall, non-mobile, fuel storage tanks in order to protect vegetation, soils, surface water, and ground water from potential contamination due to leakage from these more fragile tanks.

The purpose of proposed (1)(f) is to replace current ARM 17.24.205(12). The requirements of current ARM 17.24.205(12) are retained, except for the deletion of the requirements to grade reject fines stockpiles to a 4:1 slope. The requirement was eliminated because, when such piles are graded to a 4:1 slope, they can cover a significant amount of ground, and grading of these temporary stockpiles achieves no significant environmental advantage. Text has been added to prohibit the placement of mine material stockpiles in drainage bottoms in order to protect drainageways and prevent mine materials from being washed downstream by runoff. Text has been added to prohibit the placement of mine material on steeper slopes so that these more fragile and harder to reclaim surfaces will remain undisturbed, and so that mine material will be located where it can be retrieved. Clarification of the procedure for leaving soil next to mine material stockpiles is needed so that a proper quantity of soil is left in an appropriate location for mine material stockpile reclamation. The text also establishes a new requirement that mine materials be buried or removed from the site unless the landowner requests in writing that some or

all materials remain stockpiled. This requirement will help ensure that only valuable mine materials that are likely to be used will remain stockpiled.

The purpose of proposed (1)(g) is to replace current ARM 17.24.205(11). The requirements of current ARM 17.24.205(11) are retained, except that the requirement to dispose of wastes in accordance with the solid waste laws and rules has been broadened to include all applicable laws and rules. This would include the Water Quality Act and thereby ensure that water quality is protected. The description of clean fill conforms to the definition in the solid waste rules. Language is added to provide a mechanism for off-site generated asphalt and concrete stockpiling and recycling. Concrete and asphaltic pavement recycling is increasing at opencut sites, and this mechanism provides an alternative mechanism to the landfill operating license that would otherwise be required for recycling of this material by some opencut operations.

The purpose of proposed (1)(h) is to implement the 1999 legislative additions of 82-4-434(2)(o) and (p), MCA, which require mitigation of impacts to residential areas and other affected lands and structures. Added to this rule, to protect landowners, is a requirement that an operator repair or replace structures such as roads, gates, fences, and irrigation ditches within the permit area that may be disturbed or obliterated during an opencut operation. The catchall sentence added at the end is necessary to cover any site-specific impacts not otherwise addressed in the plan of operation.

The purpose of proposed (1)(i) is to combine and replace current ARM 17.24.205(17), (18), and (19), and add the annual report requirement that is in the Act and the Department's plan of operation form. The proposed text is needed to consolidate these miscellaneous statements under one rule. The personnel statement is amended to focus on "key personnel and subcontractors" rather than on "all persons" since in many cases it is not practical or necessary to have all on-site personnel familiar with the plan of operation. The archeological statement is amended so that all affected areas will be given appropriate protection, not just areas to be mined.

Section (2) is added to ensure that commitments made by applicants and performance standards imposed in this rule are enforceable.

NEW RULE IV PLAN OF OPERATION--RECLAMATION PLAN--AND PERFORMANCE STANDARDS (1) The plan of operation must include the following site reclamation plan commitments and information:

(a) a postmining land uses section, including a description of the type, location, and size of each postmining land use area in the main permit area. Postmining land use types include, but are not limited to, water source pond, wetland, fish pond, riparian area, grassland, shrubland, woodland, special use pasture, hayland, cropland, wildlife habitat, livestock protection site, recreation site, and residential, commercial, and industrial building sites;

(b) a soil and overburden handling section, including:

(i) a statement that the operator will strip soil before other opencut operation disturbances occur; strip, stockpile, and replace soil separately from overburden; strip a minimum of six inches of soil, if available, from accessible facility-level areas; strip all soil from accessible mine-level areas; strip and retain enough overburden, if available, from mine-level areas so that up to an 18-inch thickness of overburden and soil can be replaced on dryland mine-level reclamation, and up to a 36-inch thickness of overburden and soil can be replaced on cropland and irrigated mine-level reclamation; maintain at least a 10-foot buffer stripped of soil and needed overburden along the edges of highwalls; haul soil and overburden directly to areas prepared for resoiling, or stockpile them and protect them from erosion, contamination, compaction, and unnecessary disturbance; at the first seasonal opportunity, shape and seed to an approved perennial species mix the soil and overburden stockpiles that will remain in place for more than one year; and keep all soil on site and accessible until the approved postmining land uses are assured to the department's satisfaction. Only initial setup activities and soil stockpiling may occur on unstripped areas. The department may require that more than a six-inch thickness of soil be stripped from facility-level areas in order to protect soil quantity or quality for certain postmining land uses; and

(ii) a description of the average thicknesses of overburden and soil to be replaced on mine-level areas. Resoiled surfaces must be seeded to a cover crop, or seeded or planted to the approved vegetative species, at the first seasonal opportunity after resoiling;

(c) a surface cleanup and grading section, including:

(i) a statement that the operator will retrieve and properly use, stockpile, or dispose of all refuse, surfacing, and spilled materials found on and along access roads and in the main permit area, and leave reclaimed surfaces in a stable condition and with 5:1 or flatter slopes for hayland and cropland, 4:1 or flatter slopes for sandy surfaces, and 3:1 or flatter slopes for other sites and surfaces; leave them graded to drain off-site or concentrate water in low areas; leave them at least three feet above the ordinary water table level for dryland reclamation and at approved depths below the ordinary water table level for pond reclamation; and blend them into the surrounding topography and drainageways. The applicant may apply for and the department may approve steeper slopes for certain postmining land uses and seasonal ponds. The department may require water-table-level monitoring to ensure that appropriate reclaimed surface elevations are established; and

(ii) a description of the locations and designs for special reclamation features such as drainageways, ponds, and building sites. Reclaimed drainageways must be located in their approximate premine locations, have channel and floodplain dimensions and gradients that approximate premine conditions, and connect to undisturbed drainageways in a stable manner;

(d) an overburden and soil reconditioning section, including a statement that the operator will alleviate

overburden and soil compaction by deep tilling replaced overburden, graded surfaces, and other compacted surfaces to a depth of at least 12 inches before resoiling, and by deep tilling through the soil and into the surface of the underlying material after resoiling. Deep tillage must be done on the contour and when the overburden and soil are dry enough to shatter. Deep tilled areas must be protected from recompaction. Deep tillage is not required for relatively non-compactible materials such as sands, materials with a rock fragment content of 35% or more by volume, and bedrock. Tilling deeper than the soil thickness is not required when cobbly material or bedrock underlies the soil;

(e) a revegetation section, including:

(i) a statement that the operator will establish vegetation capable of sustaining the designated postmining land uses; ensure that areas seeded or planted to perennial species will be appropriately protected and managed from the time of seeding or planting through two growing seasons or until the vegetation is established, whichever is longer; use seed that is as weed free as is reasonably possible; and comply with the noxious weed control plan approved by the respective weed district for the opencut operation. Revegetation success on a non-cropland area is achieved when vegetation capable of sustaining the designated postmining land use has established. Revegetation success on a cropland area is achieved when a crop has been harvested from the entire area and the yield is comparable to those of crops grown on similar sites under similar growing conditions. A copy of the approved noxious weed control plan must be submitted with the plan of operation; and

(ii) a description of the types and rates of fertilizer and other soil amendment applications; methods of seedbed preparation; and methods, species, and rates of seeding or planting. When the postmining land use is hayland or cropland, the soil surface must be left free of rocks that could impede agricultural equipment. Seedbed preparation and drill seeding must be done on the contour. Broadcast seeding must be done at rates at least 100% higher than drill seeding rates and the surface dragged or pressed to cover the seed. Seeding rates must be given as pounds of pure live seed per acre. Seeding must occur during the late fall or early spring seeding seasons. Cover crop seeding and mulch application may be needed to help stabilize an area or establish vegetation;

(f) a reclamation timeframes section, including:

(i) a statement that the operator will complete all reclamation work on an area no longer needed for opencut operations, or that the operator no longer has the right to use for opencut operations, within one year after the cessation of such operations or termination of such right. If it is not practical for the operator to reclaim a certain area until other areas are also available for reclamation, the operator may request, and the department may approve, an alternate reclamation deadline for that area; and

(ii) a reasonable estimate of the month and year by which final reclamation will be completed considering the estimated

mine material demand, expected rate of production, and accessible mine material reserves. Final reclamation must be completed by the date given.

(2) Upon issuance of the permit, the operator shall comply with all commitments required by this rule and with the requirements for the conduct of operations contained in this rule.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432, 82-4-434, MCA

REASON: The purpose of proposed (1)(a) is to replace current ARM 17.24.205(2). The proposed text is needed to require sufficient descriptions of the proposed postmining land use or uses. It would give a reasonably complete reference list of common postmining land uses from which an applicant can select the appropriate terms to use in the plan of operation. It specifies that identification of the postmining land use(s) is only needed for the main permit area since it may be too cumbersome for applicants to designate a postmining land use for each land use type crossed by access roads. The zoning compliance requirement set forth in current ARM 17.24.205(2) has been moved to proposed New Rule VIII since this type of requirement is inconsistent with the plan of operation format.

The purpose of proposed (1)(b) is to replace current ARM 17.24.205(3), (4), and (13)(b), and combine the soil and overburden stripping and replacement requirements into one rule. The proposed text is needed to clearly outline necessary soil and overburden handling requirements to ensure that these resources are protected and that an adequate quantity and quality of soil and overburden are available for reclamation. The requirement to provide the method of soil and overburden stripping has been eliminated because operators often do not know the type of equipment that will be available, and this information is not needed to evaluate plan of operations. The statement about using reject fines to supplement soil thickness has been eliminated since this is an obvious alternative. Provisions relating to toxic fines are not needed since such materials are not known to be produced by opencut operations.

The purpose of proposed (1)(c) is to replace current ARM 17.24.205(9). The proposed text eliminates the requirement for a description of the anticipated postmining topography since this requirement has yielded little useful information and is adequately covered by this and other rules. The discussion of backfilling and overburden disposal has been placed in proposed New Rule III. The requirement in current ARM 17.24.205(9)(a) that surfaces must be conducive to the postmining land uses has been eliminated since this factor is addressed in numerous ways by various other rules. The substance of current ARM 17.24.205(9)(b) through (f) is retained but rewritten in a more logical order and with more concise language. Text has been added to clarify that the Department may approve steeper slopes for certain postmining land uses such as building sites or

livestock protection areas, and require water-table-level monitoring to ensure that reclaimed surface elevations are conducive to the postmining land use, be it pond or dry land. Text has been added to allow the Department to approve seasonal ponds since such ponds are valuable wildlife features and, in some cases, may be the most appropriate postmining land use, considering site characteristics. Text has also been added to provide basic reclamation standards for drainageways because drainageways require specialized reclamation techniques. Current ARM 17.24.205(9)(g) has been moved to proposed New Rule IV(1)(e).

The purpose of proposed (1)(d) is to replace current ARM 17.24.205(13)(a). The alleviation of overburden and soil compaction is a major factor in successful mine reclamation. The proposed text is needed to place more emphasis on this subject. It provides more information on when and how to alleviate compaction, and requires minimizing recompaction to promote root penetration and revegetation success.

The purpose of proposed (1)(e) is to clearly outline revegetation requirements. It replaces current ARM 17.24.205(13). The ripping requirements in current ARM 17.24.205(13)(a) have been moved to proposed New Rule IV(1)(d). The soil replacement language has been moved to proposed New Rule IV(1)(b). The proposed section simplifies information requirements. The proposed text is needed to clarify that the responsibility for site protection and management lies with the operator. It includes basic revegetation success criteria that are needed to help operators understand how revegetation success is defined and to set standards for bond or liability release. Because even quality seed lots contain a small percentage of weed seed, the proposed text is needed to change the unrealistic requirement that seed be weed free. The proposed section complements the requirements of the state weed law and requires that the operator submit a copy of the noxious weed control plan with its application.

The purpose of proposed (1)(f) is to replace current ARM 17.24.205(14) and clearly outline necessary timeframe requirements. The requirement for a statement about "concurrent" reclamation is eliminated since the term is not readily understood and "concurrency" is adequately covered by the one-year timeframe. Rather than being left open to a general response, a "date of final reclamation" would seem to be reasonably defined as "month and year." Basic criteria are listed to help an operator determine the date of final reclamation. The inclusive phrase "final reclamation" replaces the limited phrase "grading, replacement of soil material, and revegetation work."

Section (2) is added to ensure that commitments made by applicants and performance standards imposed in this rule are enforceable.

NEW RULE V PLAN OF OPERATION--RECLAMATION BOND (1) A proposed reclamation bond calculation must be submitted as part of the plan of operation on a form provided by the department.

The bond amount must be based on a reasonable estimate of what it would cost the department to reclaim, in accordance with the plan of operation, the anticipated maximum disturbance during the life of the opencut operation, including equipment mobilization and administrative costs. The department shall review the proposed bond calculation and make a final determination.

(2) Federal agencies, the state of Montana, counties, cities and towns are exempt from bond requirements.

AUTH: 82-4-422, MCA

IMP: 82-4-405, 82-4-431, 82-4-432, 82-4-433, 82-4-434, MCA

REASON: The purpose of proposed (1) is to replace current ARM 17.24.205(15). The unnecessary partial list of bonding costs in current ARM 17.24.205(15) is replaced by a reference to the plan of operation. The basic factors considered in bonding are universally understood by the Department and opencut operators, and are included on the Department's reclamation bond worksheet. The proposed rule defines the stage of disturbance for which the bond level is to be determined as the maximum disturbance in order to ensure that the bond is always adequate to pay for reclamation. The auxiliary cost factors for site reclamation--equipment mobilization and administrative costs--are often a large portion of the Department's cost of reclaiming a site, and the proposed rule ensures that these costs are part of the bond.

Section (2) places in the rules the exemption from bonding requirements contained in 82-4-405, MCA.

NEW RULE VI PLAN OF OPERATION--MAPS (1) A site map at a scale of 400 feet to one inch or larger and on a topographic map or air photo base must be submitted as part of the plan of operation. A smaller scale area map drawn on a topographic map or air photo base may also be submitted as part of the plan.

(2) The following existing and proposed main permit area features must be shown and labeled on the site map:

- (a) main permit area boundary;
- (b) staging, processing facility, and mining areas;
- (c) soil, overburden, and mine material stockpile areas;
- (d) mined-area backfill and excess overburden and fines disposal sites;
- (e) soil and overburden test hole locations;
- (f) water system and control structure locations; and
- (g) sight and sound barrier locations.

(3) The locations of existing and proposed access roads must be shown and labeled on the site or an area map.

(4) The following existing features in and within 500 feet of access roads and 1,000 feet of the main permit area must be shown and labeled on the site or an area map:

- (a) premine land uses including, but not limited to:
 - (i) water source pond;
 - (ii) wetland;

- (iii) fish pond;
 - (iv) riparian area;
 - (v) grassland;
 - (vi) shrubland;
 - (vii) woodland;
 - (viii) special use pasture;
 - (ix) hayland;
 - (x) cropland;
 - (xi) wildlife habitat;
 - (xii) livestock protection site;
 - (xiii) recreation site; and
 - (xiv) residential, commercial, and industrial sites;
 - (b) reclaimed and unreclaimed surface disturbances;
 - (c) surface water features, as described in [New Rule II(1)(a)];
 - (d) vegetative types including, but not limited to:
 - (i) wetland;
 - (ii) riparian;
 - (iii) grassland;
 - (iv) shrubland;
 - (v) woodland;
 - (vi) special use pasture;
 - (vii) hayland; and
 - (viii) cropland;
 - (e) fish and wildlife habitats of special concern, including, but not limited to:
 - (i) lakes;
 - (ii) ponds;
 - (iii) streams;
 - (iv) wetlands;
 - (v) riparian areas;
 - (vi) unique cover areas;
 - (vii) travel lanes;
 - (viii) migration routes;
 - (ix) raptor cliff and nest areas; and
 - (x) reproductive, nursery, and wintering areas;
 - (f) residential areas and structures that could be impacted by opencut operations, as described in [New Rule II(1)(e)]; and
 - (g) non-access roads, fences, utilities, and buffer zones.
- (5) The locations of existing and proposed water wells in and within 1,000 feet of the main permit area must be shown and labeled on the site or an area map.
- (6) The operator name, site name, legal description, scale, date of drafting, and north arrow must be shown on all plan of operation maps.
- (7) Complete and accurate maps must be submitted. The department may require that part or all of the area in and within 500 feet of access roads and 1,000 feet of the main permit area be surveyed to provide sufficient map detail and accuracy.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-434,
MCA

REASON: The purpose of proposed New Rule VI is to clearly state what constitutes complete and acceptable maps. Information formerly required in the plan of operation narrative is now required as map information and should make it easier for operators to provide such information.

The two lists in proposed (4) are needed to define the terms that applicants should use to describe premine land uses and vegetative types.

Proposed (7) is needed as a "complete and accurate" maps standard, and to give the Department the authority to require high-quality maps when needed to provide for adequate review of a permit application or to monitor a site.

NEW RULE VII PLAN OF OPERATION--ADDITIONAL INFORMATION AND CERTIFICATION (1) The department may require that an operator provide additional plan of operation information, including, but not limited to:

- (a) vegetation;
- (b) soil;
- (c) surface water;
- (d) ground water; and
- (e) fish and wildlife surveys and assessments.

(2) The information provided pursuant to (1)(a) through (e) must be gathered, analyzed, and presented according to current professionally accepted practices. Field data must be accompanied by the names and addresses of the parties that collected and analyzed the data, and by a description of the methodologies used to gather and analyze the data.

(3) The plan of operation must conclude with a statement signed and dated by the operator certifying that the statements, descriptions, and information provided apply to the proposed permit area, applicable adjacent areas, and proposed opencut operations, and that the requirements of the plan of operation will be followed unless officially amended through the department.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432,
82-4-434, 82-4-436, MCA

REASON: The purpose of proposed (1) and (2) is to provide a means by which the Department may require additional plan of operation information that is necessary to ensure environmental protection and reclamation to achieve the purpose of the Act. It is not always known that additional information of this kind is necessary until an initial revision of an application is conducted and site-specific concerns are identified. The optional soils and fish and wildlife information requirements in current ARM 17.24.204(4), 17.24.207(3), and 17.24.212(4) are consolidated under this proposed rule.

The purpose of proposed (3) is to provide assurance that

the plan of operation is accurate and commits the operator to comply with it.

NEW RULE VIII ZONING COMPLIANCE FOR SAND OR GRAVEL MINING

(1) In order to ensure that a proposed sand or gravel operation will be in compliance with local zoning regulations, permit applications for sand or gravel operations and amendment applications for sand or gravel operations that add acreage or change the postmining land use must include a statement from the appropriate local governing body certifying that the proposed mine site and plan of operation comply with local zoning regulations. No application for a permit or such amendment to mine sand or gravel may be approved by the department unless accompanied by such a statement submitted on a form provided by the department.

AUTH: 82-4-422, MCA

IMP: 82-4-431, 82-4-432, MCA

REASON: The purpose of proposed New Rule VIII is to fully implement the zoning compliance requirements of 82-4-432, MCA. It is more appropriate to have this requirement in a separate rule rather than have it attached to the postmining land use section as in current ARM 17.24.205(2).

NEW RULE IX ASSIGNMENT OF PERMITS

(1) A person may assume a permit from an operator by submitting an assignment application to the department. Upon receipt of an assignment application, the department shall inspect the permitted site, if necessary, and evaluate the application and existing permit to determine if the requirements of the Act and this subchapter will be satisfied.

(2) The department shall approve an assignment application if it determines that:

(a) the application contains a completed copy of the assignment application form provided by the department, and necessary revisions to the permit. The assignment application form shall include a statement that the applicant assumes responsibility for outstanding permit and site issues;

(b) the application materials and necessary revisions to the permit satisfy the requirements of the Act and this subchapter; and

(c) adequate bond has been submitted. To be adequate, the bond must meet the requirements of [New Rule V] and must include the cost to the department of reclaiming all previously disturbed lands within the permit area.

(3) An assignment does not become effective until approved by the department. The assignee must ensure that it has a complete copy of the approved permit and assignment materials. The assignee is responsible for complying with all terms of the permit, including all provisions of the plan of operation.

(4) An assignment application does not require the payment of an additional fee.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-432, 82-4-433, 82-4-434, MCA

REASON: The purpose of proposed New Rule IX is to provide the process for assignment of a permit and to ensure that assigned permits are fully enforceable. Assignments (permit transfers) promote efficiency and reduce unnecessary disturbance in mining of opencut mine materials because they provide for alternatives to the opening up of new lands for mining whenever a demand for a mine material in any particular location arises. Site inspections may be necessary and review of the existing permits is necessary as part of the assignment process, because assignment applications often involve old sites and permits that have not been inspected or reviewed for a considerable time; thus assignments offer opportunities to update site conditions and permits in accordance with current standards and legal requirements. Assignment content, review, and approval criteria need to be discussed in a separate rule. This rule is needed to specify assignment requirements, standards for approval, state when an assignment becomes effective, and make sure that the assignee has complete permit information to promote compliance by the assignee.

NEW RULE X PERMIT COMPLIANCE (1) An operator shall comply with the provisions of its permit, this subchapter, and the Act. The department may issue an order requiring abatement of a violation within a reasonable time. The applicant may request an extension of the deadline, giving the reason the extension is necessary, and the department may grant the extension upon finding that good cause for the extension has been shown. The permittee shall comply with the abatement order within the time set in the order or extension.

(2) A permittee may allow another person to mine and process mine materials from the permitted operator's site, only if the permittee retains control over that person's activities and ensures that no violations of the Act, this subchapter, or the permit occur. If the person violates the provisions of the Act, this subchapter, or the permit, the permittee is responsible for the violation, and the department may require abatement pursuant to (1).

(3) A person who conducts opencut operations at a nonpermitted site and who was obligated to obtain a permit is in violation of 82-4-431, MCA, and the department may issue an order requiring cessation of the operation and may also order abatement of the violation, including reclamation of the site, within a reasonable time. The person may request an extension of the deadline, giving reasons why the extension is necessary, and the department may grant extensions upon a finding that good cause for the extension has been shown. The person shall comply with the abatement order within the time required by the order or extension.

AUTH: 82-4-422, MCA

IMP: 82-4-402, 82-4-422, 82-4-423, 82-4-431, 82-4-432,

MCA

REASON: The purpose of proposed New Rule X is to enact necessary compliance mandates and accountability standards.

Section 82-4-422, MCA, provides that the Board shall "adopt rules that pertain to opencut mining in order to accomplish the purposes of this part [the Opencut Mining Act]." Section 82-4-402, MCA, provides that one purpose of the Act is to require reclamation of all sites that have been mined for opencut materials. The provisions in New Rule X that require compliance with the Act, rules, and the permit, and that authorize the Department to order abatement, are necessary to ensure this purpose is accomplished.

5. ARM 17.24.204 and 17.24.205, located at pages 17-1926 through 17-1931 of the Administrative Rules of Montana, are being proposed for repeal. The authority section is 82-4-422, MCA, and the implementing sections are 82-4-432 and 82-4-434, MCA. ARM 17.24.215, located at page 17-1937 of the Administrative Rules of Montana, is also being proposed for repeal. The authority section is 82-4-422, MCA, and the implementing sections are 82-4-434, 82-4-435 and 82-4-441, MCA.

The proposed repeal of ARM 17.24.204 is necessary because program experience and changes in the field of mined land reclamation call for a major revision of current ARM 17.24.204 and 17.24.205. The practical way to do such a revision is to delete the current text and replace it with rearranged and updated text (see proposed New Rules I-VII). The information in the proposed new rules is in a more logical order, and also includes necessary additions, deletions, and clarifications. Map information is set forth in proposed New Rule VI, information for premine conditions is set forth in proposed New Rules II and VI, and the option of requiring a soil survey is set forth in proposed New Rule VII.

The proposed repeal of ARM 17.24.205 is necessary because program experience and changes in the field of mined land reclamation call for a major revision of current ARM 17.24.204 and 17.24.205. The practical way to do such a revision is to delete the current text and replace it with rearranged and updated text (see proposed New Rules I-VII). The information in the proposed new rules is in a more logical order, and also includes necessary additions, deletions, and clarifications. The information in ARM 17.24.205 is set forth in proposed New Rules III and IV.

The Board is proposing to repeal ARM 17.24.215 because the Legislature, in Chapter 271, Laws of 1997 and Chapter 325, Laws of 2001, placed in statute the factors that the Department must consider in determining whether to initiate a penalty action and in determining the amount of penalty. The Board is no longer authorized to establish those factors by rule.

6. Concerned persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of

Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us, to be received no later than 5:00 p.m. November 14, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

8. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairperson

Reviewed by:

John F. North
JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State, October 6, 2003.